

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIEL DELANEY	:	CIVIL ACTION
	:	
v.	:	
	:	
KENNETH S. APFEL, <sup>1</sup>	:	
Commissioner of Social Security	:	No. 97-4884

MEMORANDUM and ORDER

Norma L. Shapiro, J.

November 3, 1998

Plaintiff Daniel Delaney ("Delaney") seeks review under 42 U.S.C. § 405(g) of the final decision of the Commissioner of Social Security (the "Commissioner") denying his claims for disability insurance benefits ("DIB") under Title II of the Social Security Act (the "Act"), 42 U.S.C. § 401, et seq., and Supplemental Security Income ("SSI") under Title XVI of the Act. See 42 U.S.C. § 1381, et seq. The parties' cross motions for summary judgment were referred to United States Magistrate Judge Thomas J. Rueter ("Judge Rueter") for a Report and Recommendation. Judge Rueter recommended that Delaney's motion for summary judgment be denied and the Commissioner's motion for summary judgment be granted. For the reasons stated below, the court will approve the Report and Recommendation and grant summary judgment in favor of the Commissioner.

---

<sup>1</sup> Kenneth S. Apfel was appointed Commissioner of Social Security on September 29, 1997 and has been substituted for his predecessor, Acting Commissioner of Social Security John J. Callahan. See Fed. R. Civ. P. 25(d)(1).

## BACKGROUND

Delaney, born on May 12, 1952, was forty-four years old at the time of his hearing before the administrative law judge ("ALJ"). (Tr. 47). After graduating from high school, Delaney completed several courses in traffic management. (Tr. 49). Delaney worked as a shipping and receiving clerk and supervisor, as a parts inspector, and as a part-time rural mail carrier. (Tr. 50). In May, 1988, Delaney injured his ankle at work. (Tr. 50, 105). Three surgical procedures were performed on his ankle on: February 14, 1989; June 23, 1989; and December 29, 1992. (Tr. 40, 144-146).

Delaney, alleging disabling pain in his left ankle, knee, hip, leg and left side of his neck, filed a claim for DIB and SSI on July 25, 1994. (Tr. 103). Delaney's claims were denied initially and upon reconsideration. (DIB denial: Tr. 72-74; SSI denial: 79-82; denial on reconsideration: 86-92).

Delaney requested a hearing before an ALJ from the Office of Hearings and Appeals. (Tr. 93). At the ALJ hearing on September 26, 1996, both a medical expert (Tr. 34-35, 37-47) and a vocational expert testified (Tr. 58-66) in addition to Delaney. The ALJ denied Delaney's claims (Tr. 16-26); the Appeals Council denied his request for rehearing on May 30, 1997. (Tr. 4). Delaney seeks review of the Commissioner's final decision.

To establish a disability under the Act, an applicant must show that there is an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C.A. § 423 (d)(1)(A) (West 1991 & Supp. 1998). An applicant can establish a disability by: 1) producing

medical evidence showing he is disabled per se by meeting or equaling the impairments listed in the regulations, see Stunkard v. Secretary of Health & Human Servs., 841 F.2d 57, 59 (3d Cir. 1988); or 2) demonstrating an impairment severe enough to prevent the applicant from engaging in "any kind of substantial gainful work which exists in the national economy." Heckler v. Campbell, 461 U.S. 458, 461 (1983); see Cerar v. Secretary of Health & Human Servs., No. 93-6973, 1995 WL 44551, at \*2 (E.D. Pa. Feb. 1, 1995) (Shapiro, J.).

The ALJ decided this case under the five-step sequential evaluation of disability claims.<sup>2</sup> See generally

---

<sup>2</sup> The five steps are:

1. "If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience." 20 C.F.R. § 404.1520(b); see also 20 C.F.R. § 416.920(b).

2. "If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment." 20 C.F.R. § 404.1520(c); see also 20 C.F.R. § 416.920(c).

3. "If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience." 20 C.F.R. § 404.1520(d); see also 20 C.F.R. § 416.920(d).

4. "If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will

(continued...)

Heckler, 461 U.S. at 467-68; Santise v. Schweiker, 676 F.2d 925, 934-35 (3d Cir. 1982), cert. dismissed, 461 U.S. 911 (1983). The five-step process is similar for both DIB and SSI. It is the applicant's burden to establish the first four steps with sufficient medical evidence. See 42 U.S.C. § 423(d)(5). If the ALJ must reach the fifth step, the burden is on the Commissioner to show that the applicant has the ability to perform specific jobs existing in the national economy. See Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979).

The ALJ made the following findings: 1) Delaney "has not engaged in substantial gainful activity since December 18, 1992" (Tr. 24); 2) the evidence established that Delaney suffers from degenerative arthritis, left ankle; osteochondritis, left ankle; mild arthritis, cervical spine; and mild disc disease, lumbar spine (Tr. 24), a severe impairment (Tr. 24); 3) this severe impairment did not meet or equal any impairments listed in the regulations (Tr. 24); 4) the impairment precludes Delaney from performing any of his past work. (Tr. 25).

The ALJ reached the last step of the sequential evaluation and found although Delaney is unable to perform the full range of sedentary work, he is "capable of making an adjustment to work which exists in significant numbers in the national economy." (Tr. 25). The ALJ adopted the vocational

---

<sup>2</sup>(...continued)  
find that you are not disabled." 20 C.F.R. § 404.1520(e); see also 20 C.F.R. § 416.920(e).

5. "If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled." 20 C.F.R. § 404.1520(f)(1); see also 20 C.F.R. § 416.920(f)(1).

expert's testimony that Delaney could work as a cashier, information clerk, order clerk or as an inspector as long as he has the option "to alternate at will between a sitting and a standing position, and with no prolonged standing or walking." (Tr. 24). Because the ALJ found Delaney could perform other work existing in the national economy, see Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979), she found him not disabled and denied benefits.

Judge Rueter issued a Report and Recommendation that the Commissioner's decision be upheld and summary judgment be granted in his favor. Delaney objected to Judge Rueter's Report and Recommendation on the ground that Judge Rueter erred in finding that substantial medical evidence supported the Commissioner's determination that Delaney was capable of performing a limited range of sedentary work.

## **DISCUSSION**

### **I. Standard of Review**

The court conducts de novo review of the portions of a magistrate judge's Report and Recommendation to which specific objections have been filed. See 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).

The decision of the Commissioner must be upheld as long as it is supported by substantial evidence. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390 (1971); Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986). "Substantial evidence is defined as the relevant evidence which a reasonable mind might accept as adequate to support a conclusion." Maduro v. Shalala, No. 94-6932, 1995 WL 542451, at \*1 (E.D. Pa. Sept. 9, 1995) (Shapiro, J.); see Richardson, 402 U.S. at 401; Dobrowolsky v. Califano,

606 F.2d 403, 406 (3d Cir. 1979). Substantial evidence is "more than a scintilla of evidence but may be somewhat less than a preponderance of the evidence." Maduro, 1995 WL 542451, at \*1; see Ginsburg v. Richardson, 436 F.2d 1146, 1148 (3d Cir.), cert. denied, 402 U.S. 976 (1971). The court cannot conduct de novo review of the Commissioner's decision or re-weigh the evidence of record. See Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986), cert. denied, 482 U.S. 905 (1987).

## **II. Substantial Evidence of Delaney's Ability to Perform Limited Sedentary Work**

Delaney claims the record lacks substantial evidence supporting the ALJ's conclusion that he has the residual functional capacity to perform limited sedentary work<sup>3</sup> available in the national economy.

On September 11, 1990, approximately one year after his second ankle operation, Delaney's left ankle was examined by Marc Manzione, M.D. who found full range of motion. (Tr. 541, 545). Although Delaney complained of tenderness when the ankle was palpated, there was no redness or swelling. (Tr. 545). Dr. Manzione also examined Delaney's back and neck and reported a full range of motion in the neck with no pain. (Tr. 543-544). Dr. Manzione's examination found "no objective abnormalities and certainly no abnormalities to suggest any cervical or lumbar radiculopathy." (Tr. 544-545).

---

<sup>3</sup> "Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 416.967(a).

On September 25, 1990, Delaney was examined by Paul L. Weidner, M.D. (Tr. 356). Dr. Weidner reported that Delaney suffered mainly lower back pain. (Tr. 356). Dr. Weidner found no numbness or tingling in Delaney's legs and no weakness or strength loss in the lower extremities. (Tr. 356). The spinal x-rays provided Dr. Weidner showed "pretty much normal appearance of the vertebra and their alignment." (Tr. 356).

Sometime after the second operation, Delaney began regular treatment for his neck and back pains from a chiropractor, Frederick M. Grohosky, D.C. (Tr. 54, 232-234). On April 1, 1992, ten months prior to the third ankle operation, Dr. Grohosky reported that Delaney was having less pain in his back and neck and could resume some of his daily activities. (Tr. 233).

On April 21, 1993, after the third left ankle surgery, Dr. Boland, the surgeon, reported excellent motion in his left ankle, the sensitivity gone (Tr. 147); Delaney had minor arthritis of his left ankle, but no progressive degenerative arthritis. Dr. Boland said he might return to work activities as tolerated. (Tr. 147).

In March, 1994, Delaney was examined by Dr. Joe O'Neill (Tr. 104) who referred Delaney for physical therapy. (Tr. 248). When asked to evaluate Delaney's ability to perform work related activities, Dr. O'Neill reported that Delaney could work standing and walking for less than two hours and could work sitting for less than six hours. (Tr. 248).

On June 2, 1994, Dr. Boland reported that, as a result of his chronic low grade arthritis and consequent limited range of motion in the left ankle, Delaney "would have trouble with any activity which would require prolonged standing or walking, and

it does change his gait which may contribute to his other problems." (Tr. 147).

On July 13, 1994, Delaney's chiropractor, Dr. Grohosky, stated that Delaney's ongoing spinal adjustments permit Delaney "to do the normal everyday things such as: Playing with his son. Driving to the store and similar other things which might be required." (Tr. 191). Dr. Grohosky stated that Delaney's back pain was a result of his altered gait from left ankle pain. (Tr. 191).

On January 12, 1995, Gene Levin, M.D., the disability examiner reported that Delaney complained of ankle, back, lower back and neck pain, but the complaints were disproportionate to the physical findings and the cause of his symptoms was unclear. (Tr. 250-251). Dr. Levin found limited range of motion in Delaney's left ankle but no evidence of muscular atrophy nor any evidence of gross motor deficit in the muscle groups in the upper or lower extremities. (Tr. 251).

Delaney stated that on September 22, 1995, while on a camping trip, he fell, hit his head and lost consciousness for about thirty seconds. (Tr. 55, 264, 284). Four days later Delaney went to an emergency room and complained of difficulty concentrating and a "groggy" sensation. (Tr. 284). Delaney denied any difficulty with vision or balance, and denied headache or neck pain but reported some lumbar pain. (Tr. 284). An x-ray of his spine and pelvis was normal. (Tr. 285, 287).

The emergency room evaluation of Dr. Iaccarino revealed no focal neurological defects of the cranial and peripheral nerves, the pupils were equal and briskly reactive, the extra-ocular muscles were intact. Romberg's test was normal. He was

able to ambulate without difficulty of balance. His vision was intact. (Tr. 285).

On October 13, 1995, Delaney was examined by a neurologist, Jeffrey H. Striar, M.D. (Tr. 264). Dr. Striar reported that Delaney claimed to suffer from daily headaches since the accident, constant blurred vision and occasional double vision as well as tinnitus in his left ear. (Tr. 264). Delaney also complained of cervical pain which Dr. Striar believed was contributing to Delaney's headache and dizziness. (Tr. 264-265). Delaney exhibited some signs of diplopia (double vision) and Dr. Striar recommended wearing an eye patch until the condition improved. (Tr. 265). A subsequent CT scan and MRI of Delaney's head were normal. (Tr. 264, 266-67, 288).

On October 27, 1995, two weeks after his initial visit, on Delaney's return to Dr. Striar's office, he complained that the diplopia remained unchanged and was accompanied by headaches when he was not wearing an eye patch. (Tr. 267). Delaney also complained of cervical pain radiating to his shoulders. (Tr. 267). Delaney refused to permit Dr. Striar to examine his neck. (Tr. 267). After Dr. Striar told him that he needed to exercise his neck to achieve improvement, Delaney "became quite upset and terminated the visit." (Tr. 267). Dr. Striar was not able to complete his exam of Delaney's alleged diplopia (Tr. 267), but he found Delaney's memory normal on objective testing, cranial nerves normal and visual fields full, no local weakness or sensory defect in Delaney's arms or legs and normal reflexes. (Tr. 264-65). Dr. Striar stated that he suspected "some element of post concussion syndrome with over exaggeration of the symptomatology by [Delaney] as an explanation for [Delaney's] multiple complaints that do not correlate to MRI findings or clinical evaluation previously." (Tr. 268).

Stanley Askin, M.D. testified as a medical expert at the ALJ hearing. (Tr. 37-47). Dr. Askin, an orthopedic surgeon, testified that Delaney suffered from degenerative arthritis of his left ankle. (Tr. 37, 373). Dr. Askin noted that no diagnosis of record explained Delaney's complaints of neck and back pain. (Tr. 37-38). Dr. Askin stated that some of Delaney's complaints might be the ordinary pains attributable to aging. (Tr. 38-39). Dr. Askin testified that Delaney's ankle injury "would inhibit walking and standing and climbing steps" and that Delaney's neck and back pain could be reasonably accommodated by allowing him to stand up from time to time. (Tr. 42-43). Dr. Askin concluded that Delaney's condition should result in a light duty work restriction, permitting him to lift ten pounds frequently and twenty pounds occasionally. (Tr. 44).

The ALJ, considering all of the above evidence, found Delaney was severely impaired by degenerative arthritis, left ankle; osteochondritis, left ankle; mild arthritis, cervical spine; and mild disc disease, lumbar spine. (Tr. 24). However, the ALJ determined that those impairments did not affect Delaney's residual functional capacity to perform other sedentary work. (Tr. 25).

"Residual functional capacity is an assessment based upon all of the relevant evidence." 20 C.F.R. § 404.1545(a). The record shows that Delaney is able to drive his car on errands and to the chiropractor's office, walk his son to the bus, "normally cook dinner every night," read the newspaper and watch television. (Tr. 49, 53, 57-58, 112). One and one-half years after the third and final foot operation, Dr. Boland noted only that Delaney "would have trouble with any activity which would require prolonged standing or walking." (Tr. 147). Dr. Boland did not preclude Delaney from performing sedentary work. Based

upon his March 1994 examination, Dr. O'Neill reported that Delaney could work standing and walking for less than two hours and could work sitting for less than six hours (Tr. 248), but on July 13, 1994, Delaney's chiropractor, Dr. Grohosky, stated that Delaney's ongoing spinal adjustments permit Delaney "to do the normal everyday things such as: Playing with his son. Driving to the store and similar other things which might be required." (Tr. 191). Not only the testimony of the medical expert, but that of Delaney's treating physicians, except perhaps for Dr. O'Neill, supported a finding that he could perform limited sedentary work, i.e. lifting no more than 10 pounds and involving sitting and an occasional amount of walking and standing. See 20 C.F.R. § 416.967(a).

The ALJ determined Delaney could perform this limited sedentary work if he were allowed to alternate between sitting and standing with no prolonged standing or walking. (Tr. 24-25). In addition, giving claimant the benefit of the doubt, the ALJ also concluded that he was incapable of any more than limited up-down or side-to-side neck motion, or tasks requiring fine visual acuity. (Tr. 24). Nevertheless, although he was unable to perform the full range of sedentary work, the ALJ found Delaney was capable of making an adjustment to work that, based on the vocational expert's testimony, existed in significant numbers in the national economy. See Dobrowolsky, 606 F.2d at 406; Maduro, 1995 WL 542451, at \*1. Upon review of the record, the ALJ's determination was supported by substantial evidence in the record for a "reasonable mind" to reach such a conclusion. See 42 U.S.C. § 405(g); Richardson, 402 U.S. at 390.

Delaney argues that the ALJ improperly discredited his subjective complaints of pain. The ALJ did accept Delaney's testimony regarding his subjective symptoms, but only to the

extent that they were supported by objective medical evidence. (Tr. 19-22). The ALJ found "[t]hough claimant asserts inability to work due to his pain and related subjective symptoms, his complaints are not credible to the extent his objective test results and clinical findings do not show impairments with the degree of severity needed to produce the disabling pain and other symptoms asserted." (Tr. 19). The ALJ stated:

The claimant's statements concerning his impairments and their impact on his ability to work have not been accepted in toto in light of the degree of medical treatment required, the reports of the treating and examining practitioners, the medical history, the findings made on examination, the claimant's assertions concerning his ability to work, and the claimant's own description of his activities and life style.

(Tr. 18). The ALJ's finding that the "objective medical evidence and clinical findings of record do not show an impairment or impairments with the degree of severity likely to produce pain and other symptoms to the disabling degree alleged," (Tr. 19), is supported by substantial evidence.

If a claim is based on subjective complaints of pain, "there must be medical signs and laboratory findings which show . . . a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all of the other evidence . . . , would lead to a conclusion that . . . [the applicant is] disabled." 20 C.F.R. §§ 404.1529(b), 416.929(b); see Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993).

The ALJ properly considered Delaney's subjective complaints and rejected them only after reviewing medical evidence unsupportive of the severity of his complaints. Dr. Levin found Delaney's complaints disproportionate to the negative physical findings and Dr. Striar also reported Delaney over

exaggerated his symptomatology. The ALJ could consider these opinions in evaluating the credibility of Delaney's subjective complaints.

The ALJ's finding that Delaney is capable of performing a limited range of sedentary work is supported by substantial evidence. Therefore, the Report and Recommendation to grant summary judgment in favor of the Commissioner will be approved and adopted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIEL DELANEY	:	CIVIL ACTION
	:	
v.	:	
	:	
KENNETH S. APFEL, <sup>1</sup>	:	
Commissioner of Social Security	:	NO. 97-4884

ORDER

AND NOW, this 3rd day of November, 1998, upon consideration of the parties' cross-motions for summary judgment, de novo review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter ("Judge Rueter"), and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Judge Rueter's Report and Recommendation is **APPROVED AND ADOPTED**.

2. Plaintiff's motion for summary judgment is **DENIED**.

3. Defendant's motion for summary judgment is **GRANTED**. Judgment is **ENTERED** in favor of defendant.

---

Norma L. Shapiro, J.

---

<sup>1</sup> Kenneth S. Apfel was appointed Commissioner of Social Security on September 29, 1997 and has been substituted for his predecessor, Acting Commissioner of Social Security John J. Callahan. See Fed. R. Civ. P. 25(d)(1).